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No. 07-1239

IN THE
Supreme Court of the United States

DONALD C. WINTER, *et al.*,
Petitioners,
v.
NATURAL RESOURCES DEFENSE COUNCIL, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF CALIFORNIA FORESTRY ASSOCIATION, AMERICAN FARM BUREAU FEDERATION, AMERICAN FOREST & PAPER ASSOCIATION, CROPLIFE AMERICA, AND NATIONAL ASSOCIATION OF HOME BUILDERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICI CURIAE*[1]

Amici are trade associations representing companies that operate in the geographical area encompassed by the Ninth Circuit. *Amici* are the California Forestry Association, American Farm Bureau Federation, American Forest & Paper Association, CropLife America, and National Association of Home Builders.

Our members have vital business interests in the two questions presented in the Petition.

Question 2 in the Petition and the Brief for Petitioners concerns whether the "preliminary injunction" standards the Ninth Circuit invoked are "inconsistent with established equitable principles limiting discretionary injunctive relief." Pet. Br. at I. The easily-met standards that the Ninth Circuit applied were developed in cases that enjoined activities of some of *Amici*'s members. *See* App. 37a, 76a (relying on *Earth Island Inst. v. U.S. Forest Serv.*, 442 F.3d 1147 (9th Cir. 2006)). As this illustrates, the availability of preliminary injunctions affects core business interests of *Amici*.

The first and second questions presented also encompass issues of compliance with National Environmental Policy Act ("NEPA") procedures, and whether a curable procedural NEPA default presumptively warrants a substantive injunction.

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[1] Petitioners and Respondents have consented to the filing of this brief in letters on file in the clerk's office. No counsel for a party authored this brief in whole or in part, and no person or entity, other than *Amici*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

The business operations of our members are subject to injunctions if a federal agency is found not to have fully satisfied NEPA. Hence, *Amici* have significant economic interests in the resolution of the NEPA and injunctive relief issues.

Amici's perspective is that, in cases involving environmental issues – such as the marine mammal issues in this case – the Ninth Circuit sets the bar too low for what should be an extraordinary preliminary injunction. We also are of the view that a substantive injunction is not required for every procedural shortcoming under NEPA. Accordingly, *Amici* support Federal Petitioners.

SUMMARY OF ARGUMENT

The Ninth Circuit granted an intrusive preliminary injunction that responsible Executive Branch officials believe compromises our Nation's military preparedness. The panel employed that circuit's easily-met standards for a preliminary injunction. Under one standard, the "mere possibility of irreparable injury" is sufficient. Further, the Ninth Circuit continued its practice of analyzing the public interest and party hardships in a manner skewed heavily towards environmental preservation. As occurred here, those standards and analyses end up preliminarily enjoining a wide variety of important federal programs and productive private activities.

The Ninth Circuit's outlier standards for, and approach to, preliminary injunctions should be reversed. They contravene longstanding equitable principles and this Court's precedents.

ARGUMENT

I. The Ninth Circuit's Equitable Standards And Analyses Set The Bar Too Low For What Should Be An Extraordinary Preliminary Injunction

Any injunction is an "extraordinary remedy" which does not issue "as of course" or for "trifling" injuries. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311-12 (1982) (reversing an injunction against Navy training exercises). Preliminary injunctions are subject to the "same" stringent standards "as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success." *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 542, 546 n.12 (1987) (reversing a preliminary injunction and the Ninth Circuit's presumption that environmental injury is irreparable). "A preliminary injunction is an 'extraordinary and drastic remedy'" that "is never awarded as of right." *Munaf v. Geren*, 128 S. Ct. 2207, 2219 (2008) (quoting 11A WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE § 2948 (2d ed. 1995)).

Yet, in this case, as in many other Ninth Circuit decisions, what should be an "extraordinary" preliminary injunction has become "ordinary" where some environmental interest is involved. Before many Ninth Circuit panels, the interest in preservation dominates, even though there are

substantial public interests against enjoining a particular federal agency program.[2]

This seems to recur for at least two reasons. First, the Ninth Circuit has adopted easily-met standards for a preliminary injunction. Second, those standards are frequently applied in a manner heavily skewed towards preservation interests.

This approach has the effect, of course, of preliminarily enjoining a greater percentage of beneficial federal programs and private economic activities. The Ninth Circuit's approach also encourages forum shopping. Certain plaintiffs, such as environmental advocacy groups, perceive it is in their interests to select a venue within the Ninth Circuit.

As developed in the subsections below, the Ninth Circuit's approach is contrary to sound equity practice and to this Court's precedents.

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[2] *E.g., Sierra Forest Legacy v. Rey*, 526 F.3d 1228, 1233-34 (9th Cir. 2008) (short-term tree preservation trumps reducing wildfire risks); *Lands Council v. Martin*, 479 F.3d 636 (9th Cir. 2007) (reversing the denial of a preliminary injunction); *Earth Island Institute v. U.S. Forest Serv.*, 442 F.3d 1147, 1177 (9th Cir. 2006) ("preservation of our environment" is "clearly in the public interest" and trumps post-fire restoration and salvage logging); *Washington Toxics Coal. v. EPA*, 413 F.3d 1024 (9th Cir. 2005) (substantive injunction for procedural default, burden of proving absence of harm to wildlife shifted to federal defendants); *Save Our Sonoran v. Flowers*, 408 F.3d 1113 (9th Cir. 2005) (residential development preliminarily enjoined for likely procedural defaults); *Earth Island Inst. v. U.S. Forest Serv.*, 351 F.3d 1291, 1308 (9th Cir. 2003).

A. The Ninth Circuit's Alternative Tests For A Preliminary Injunction Contravene Controlling Equitable Principles And Precedents

The Court has consistently required a plaintiff to satisfy four prerequisites before a *permanent* injunction can issue.

> According to well-established principles of equity, a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law . . . are inadequate . . . ; (3) that, considering the balance of hardships between the plaintiffs and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

eBay v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006) (reversing the lower court practice of automatic injunctions for patent infringements). The "standard for a *preliminary* injunction is essentially the same," except that the plaintiff must show a "likelihood of success on the merits" in addition to showing "irreparable injury" and that the "public interest" supports a preliminary injunction. *Amoco Prod.*, 480 U.S. at 542, 546 n.12 (emphasis added); *see Doran v. Salem Inn*, 422 U.S. 922, 931 (1975).

A stay pending appeal is a subset of the universe of preliminary injunctions. There, this Court has employed the same four-part test.

> [T]he factors regulating the issuance of a stay are generally the same: (1) whether the stay

> applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Hilton v. Braunskill, 481 U.S. 770, 777 (1987).

Yet, in the Ninth Circuit, a preliminary injunction can be granted under alternative tests that eliminate some of the four prerequisites to an extraordinary injunction.[3] As the Ninth Circuit stated here:

> Alternatively, a court may grant the injunction if the plaintiff demonstrates either a combination of probable success on the merits and the possibility of irreparable injury or that serious questions are raised and the balance of hardships tips sharply in his favor.

App. 36a-37a.

Under this statement, the first alternative allows a preliminary injunction to be granted without considering the public interest or balancing hardships to the parties, and only requires a "possibility" of irreparable injury. (The district court apparently applied this alternative test, *see* App.

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[3] The difference between the four-factor "Traditional Test (Most Circuits)" and the "Alternative Test (Ninth Circuit)" is described in the literature. Brosnahan, *Obtaining A Preliminary Injunction And Temporary Restraining Order*, ALI-ABA Course of Study (2007), available as Westlaw SN009 ALI-ABA 1345, 1348-50.

163.) The second alternative does not require a likelihood of success on the merits, and allows an injunction to issue without irreparable injury and without considering the public interest. These alternative tests clearly offend this Court's equity jurisprudence.

Moreover, even where those tests are ostensibly not applied, quoting the alternative tests in an opinion taints the process. It creates the false impression in many judges' minds that there is a quite-low threshold for a preliminary injunction. The Court should correct that misimpression in its opinion.

B. Longstanding Equitable Principles Require More Than A "Mere Possibility" Of Irreparable Injury

In the Ninth Circuit, a "possibility" or "mere possibility" of irreparable injury suffices to qualify for a preliminary injunction. App. 74a-77a, 172a; *see*, *e.g.*, *Earth Island Inst.*, 442 F.3d at 1159. A "mere possibility" standard is inconsistent with this Court's precedents and equity practice.

The "basis for injunctive relief in the federal courts has always been irreparable injury and the inadequacy of legal remedies." *Romero-Barcelo*, 456 U.S. at 312. This Court has appropriately required a sufficient likelihood of irreparable injury to qualify for extraordinary initial equitable relief. A "preliminary injunction requires the plaintiff to show that in the absence of its issuance he will suffer irreparable injury." *Doran*, 422 U.S. at 931. The irreparable injury standard is "essentially the same" for preliminary and permanent injunctions, and plaintiff must show that environmental injury is "of

long duration" and "is sufficiently likely" before the injury becomes "irreparable." *Amoco Prod.*, 480 U.S. at 545, 546 n.12. Under the comparable standard for a permanent injunction, the "plaintiff must demonstrate . . . that it has suffered an irreparable injury." *eBay*, 547 U.S. at 391; *see Hilton v. Braunskill*, 481 U.S. at 777 (the equivalent test for a stay is "whether the applicant will be irreparably injured absent a stay"). This Court stated a "likelihood of irreparable injury" standard in *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 666 (2004).

"It frequently is observed that a preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing,* carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (quoting 11A WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE § 2948 (2d ed. 1995) (emphasis added in opinion)). As part of that "clear showing," a plaintiff must demonstrate at least a "likelihood of success on the merits." *Amoco Prod.*, 480 U.S. at 546 n.12. Similarly, in the typical case, a preliminary injunction should not issue unless plaintiff shows that irreparable injury is at least "likely." Reflecting the common equity practice, most circuit courts also require more than a "mere possibility" of irreparable injury.[4] As a noted treatise summarizes, the

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[4] *See Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297-98 (D.C. Cir. 2006); *Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1267-68 (10th Cir. 2005); *Siegel v. LePore*, 234 F.3d 1163, 1176 and n.9 (11th Cir. 2000) (en banc); *Adams v. Freedom Forge Corp.*, 204 F.3d 475, 484-85 (3d Cir. 2000); (continued…)

> single most important prerequisite for the issuance of a preliminary injunction is a demonstration that it if is not granted the applicant is *likely* to suffer irreparable harm. . . . There must be a *likelihood* that irreparable harm will occur.

11A WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE § 2948.1 (2d ed. 1995).

A "mere possibility" of irreparable injury standard sets the bar too low. Such a standard will often be met and is tantamount to no standard at all. *See* Pet. Br. at 19, 39, 45. "Risk is a pervasive element of modern life; to say more would belabor the obvious." *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 775 (1983). Almost any Department of Defense field activity or any land-use activity conducted by others arguably creates a risk or possibility of injury to some part of the environmental *status quo*. As former Chief Justice Rehnquist concluded in his role as Circuit Justice, some "added risk does not rise to immediate irreparable harm." *Beltran v. Smith*, 458 U.S. 1303, 1305 (1982).

The Ninth Circuit found that its "mere possibility of irreparable injury" test was satisfied

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Cooper v. Salazar, 196 F.3d 809, 913, 816 (7th Cir. 1999); *Sierra Club v. City of San Antonio*, 112 F.3d 789, 793 (5th Cir. 1997); *Davis v. Francis Howell Sch. Dist.*, 104 F.3d 204, 206 (8th Cir. 1997); *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 812 (4th Cir 1991); *Lakedreams v. Taylor*, 932 F.2d 1103, 1107 (5th Cir. 1991); *Town of Huntington v. Marsh*, 884 F.2d 648, 652-53 (2d Cir. 1989); *State of New York v. Nuclear Regulatory Comm'n*, 550 F.2d 745, 755 (2d Cir. 1977).

due to sonar's *potential* to injure individual marine mammals. App. 74a-77a. The "possibility" test seemed to be crucial. The "record contains no evidence that marine mammals have been harmed by the use of MFA sonar in the Southern California Operating Area." App. 76a.

Scientists believe "sonar *may* cause injury" to some marine mammals in certain circumstances. App. 76a (emphasis added). The "injuries" often could be minor. Most of the hypothesized injuries from sonar to marine mammals consist of "Level B" temporary hearing problems and other non-permanent injuries. App. 17a-20a, 63a-65a, 75a-76a. The Navy's agreement to additional mitigation measures reduces the potential for truly irreparable injuries. *See generally* Pet. Br. at 7-11, 15, 39-45.

Amici encourage the Court to provide three responses. First, the Court should find a "mere possibility" of irreparable injury is insufficient for an extraordinary preliminary injunction.

Second, the Court should clarify that competing claims of irreparable injury must be balanced. Where "plaintiff and defendant present competing claims of injury," courts should reconcile and balance. *Romero-Barcelo*, 456 U.S. at 312; *see Purcell v. Gonzalez*, 549 U.S. 1, 7 (2006).[5] This

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[5] For example, in forest settings, courts should "take account of the 'short- and long-term effects' of both action and inaction." *Wildwest Inst. v. Bull*, 472 F.3d 587, 592 (9th Cir. 2006); *see The Lands Council v. McNair*, __ F.3d __, 2008 WL 2640001 at *21 (9th Cir. 2008) (en banc). That is, passive management of forests increases the risks of stand-replacing wildfires and the irreparable injury such wildfires present for (continued…)

might occur by either: (1) restylizing the irreparable injury factor in terms of the balance of the likelihood of, and severity of, irreparable injuries from the grant or denial of a preliminary injunction to both plaintiff and defendant; or (2) emphasizing that a court must consider, in assessing the public interest and the balance of hardships to the parties, the irreparable injuries that may occur if a preliminary injunction were granted. Either of these mechanisms would ensure that the entire equation pertinent to the equities is considered, and that irreparable injuries to defendants' interests are not downplayed.

Third, with respect to alleged injuries to wildlife, the Court should find that irreparable injury to wildlife must be demonstrated at the population or species level. The "mere possibility" of injury to a few individuals should not be sufficient. We explore this point below.

C. Irreparable Injury To Wildlife Should Consist Of Species-Level Harm

The Ninth Circuit doubted "that NRDC was required to demonstrate the possibility of irreparable

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(continued)
human and animal communities. *See id.* As the U.S. Fish and Wildlife Service has stated:

> [F]uels-reduction activities in the Sierras...will have a long-term benefit to California spotted owls by reducing the risk of catastrophic wildfire. As stated above, a primary threat to spotted owls is loss of habitat and subsequent population losses of spotted owls due to stand-replacing wildfire in unnaturally dense forest stands.

71 Fed. Reg. 29901, 29907 (May 24, 2006).

injury at the species or stock-level." App. 77a. The Court should find that, outside certain Endangered Species Act ("ESA") situations,[6] irreparable injury to wildlife – and to plaintiffs' ability to view wildlife – exists only if the action harms the species at a population level. *See* Pet. Br. at 43-45.

1. Logically, this is the correct result because the loss of a few individuals from a healthy population is not irreparable from the standpoint of population biology. If an activity poses risks to just a few members of a wildlife species, but a reproducing population is retained over time, truly irreparable injury is avoided. If a sufficient population is maintained through time, the species continues to reproduce and thrive. Moreover, if a sufficient wildlife population remains for viewing by Respondents' members, they may well lack standing and at least do not suffer irreparable harm to their interests.[7]

The principle that wildlife species do not suffer irreparable injury if a few members of the species

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[6] ESA § 9 makes it unlawful to "take" a member of an "endangered" wildlife species, and such a "take" can be enjoined in an ESA § 11 citizen suit. 16 U.S.C. 1538(a)(1)(B) and 1540(g); *see Babbitt v. Sweet Home Chapt. of Commtys. for a Great Oregon*, 515 U.S. 687 (1995). The panel did not address any ESA claim that sonar causes the unlawful "take" of a member of an endangered wildlife species.

[7] Individual wildlife and wildlife species lack standing. *E.g., Sierra Club v. Morton*, 405 U.S. 727 (1972); *Cetacean Community v. Bush*, 386 F.3d 1169 (9th Cir. 2004) (dismissing a suit challenging the Navy's use of sonar). To have standing, a plaintiff must show some personal injury to an interest in viewing wildlife. *See id.*; *Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181-83 (2000).

are taken underlies most fishing and hunting programs. For example, the Magnuson-Stevens Fishing Conservation and Management Act promotes optimum use and maximum sustainable (human) use of fish species. *See* 16 U.S.C. 1802(33), 1853(a).

2. Mankind's economic and national defense activities often necessarily alter the environment in some way. Those activities thereby create risks of injury to a few members of *some* species,[8] be it insects or mammals. If this Court were to sanction a test of "mere possibility of irreparable injury to an individual animal," the practical effects include more preliminary injunctions, decreased economic activity, delays in public projects, and impaired national defense.

The Court should avoid those results. The temporary injury to, or risk of loss of, a few members of a wildlife species is not sufficient harm to warrant an extraordinary injunction. *See Romero-Barcelo*, 456 U.S. at 311-12.

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[8] For example, wildlife issues frequently arise in forest management. Because each species prefers a particular habitat, choosing *any* form of active or passive forest management inevitably increases the population size of some species and decreases the population count for other species. *Sierra Club v. Espy*, 38 F.3d 792, 800-02 (5th Cir. 1994); *see Seattle Audubon Soc'y v. Moseley*, 80 F.3d 1401, 1404 (9th Cir. 1996). Nonetheless, the Ninth Circuit sometimes finds the risks that active forest management poses to some members of a wildlife species warrant a preliminary injunction, despite benefits to other species and to other public interests. *E.g.*, *Earth Island*, 442 F.3d at 1170-77.

3. The Ninth Circuit's approach – where injuries to a few members of a robust species constitute irreparable injury – effectively presumes that any wildlife injury is irreparable. This reinstates a test that was rejected in *Amoco Prod.*, 480 U.S. at 544-46. There, this Court reversed the Ninth Circuit's presumption that environmental injury is irreparable. The Court found such a "presumption is contrary to traditional equitable prerequisites." 480 U.S. at 545.

4. Finally, it is pertinent that the majority of lower courts have found, outside the context of ESA "take" of wildlife, there is no irreparable injury when an action poses risks to a few individuals, but not to the species.

Most significantly, the First Circuit denied a preliminary injunction against Navy training exercises (bombing Vieques Island) for an alleged "procedural violation of the ESA" because plaintiffs had not made a "concrete showing of probable deaths [of ESA-listed species] during the interim period and of how these deaths may impact the species." *Water Keeper Alliance v. U.S. Dep't of Defense*, 271 F.3d 21, 33-34 (1st Cir. 2001).[9] Similarly here, the alleged

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[9] Other lower court decisions finding that irreparable injury should be determined at the wildlife population level, not the individual level, include the following. *Fund for Animals v. Frizzell*, 530 F.2d 982, 986-87 (D.C. Cir. 1975) (refusing to accept the "extreme contention that the loss of only one bird is sufficient injury to warrant a preliminary injunction; rather, a proponent of such an injunction must raise a substantial possibility that the harvest of excessive numbers of these waterfowl will irretrievably damage the species"); *Sierra Nevada Forest Prot. Campaign v. Rey*, No. 05-cv-0205 MCE GGH, 2007 WL 3034931 at *9 (E.D. Cal. Oct. 16, 2007) (continued…)

procedural violation of the National Environmental Policy Act ("NEPA") does not warrant a preliminary injunction against other military preparedness exercises in the absence of proof of injury at the population level for non-ESA wildlife. *See also* Section III, below.

At the cert stage, Respondents cited *Greater Yellowstone Coal. v. Flowers*, 321 F.3d 1250, 1257-58 (10th Cir. 2003), on irreparable injury to wildlife. But under that opinion, courts must consider the purposes of the particular statute in determining whether irreparable injury applies at the individual or population level. The Ninth Circuit found a likely NEPA violation. NEPA focuses on "adverse effects on a species, not the impact on individuals." *Envtl. Prot. Info. Ctr. v. U.S. Forest Serv.*, 451 F.3d 1005, 1010 (9th Cir. 2006).

D. The Analyses Of The Public Interest And Of Hardships To The Parties Were Skewed Too Heavily In Favor Of Preservation

The Ninth Circuit did engage in some superficial balancing of competing public interests. But the bottom line is that environmental preservation interests dominated. The panel found

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("irreparable harm in this context depends on a demonstrable impact to the species as a whole"), *rev'd on other grounds sub nom. Sierra Forest Legacy v. Rey,* 526 F.3d 1228 (9th Cir. 2008), *petitions for rehearing pending*; *Natural Resources Defense Council v. Kempthorne*, No. 05-cv-1207 OWW TAG, 2007 WL 1989015 at *13 (E.D. Cal. July 3, 2007); *Alabama v. U.S. Army Corps of Eng'rs*, 441 F. Supp. 2d 1123, 1135-36 (N.D. Ala. 2006).

the risk of injury to individual marine mammals from sonar to be controlling under the "mere possibility" of irreparable injury test, under the balance of harms among the parties test, *and* under the public interest test. *See* App. 75a-77a, 87a-89a; Pet. Br. at 42-43, 45-47 (describing the "Ninth Circuit's distortion of equitable principles" under its "asymmetrical approach"), 49-54. This repeats a pattern in which the Ninth Circuit often grants preliminary injunctions, employing analyses heavily skewed towards short-term environmental preservation. *See* cases cited in note 2.

1. The Ninth Circuit's pattern contravenes this Court's guidance that all public interests must be fairly considered. Congress gives meaning to the public interest in the statutes it enacts. Accordingly, courts must consider the public interest as defined in statutory law. *Amoco Prod.*, 480 U.S. at 547 (the Ninth Circuit erred in not considering the public interest in oil and gas development reflected in the Outer Continental Shelf Lands Act).

Here, while the Marine Mammal Protection Act ("MMPA") ordinarily favors the interests of marine mammals, the MMPA allows the Secretary of Defense to exempt activities "necessary for national defense." 16 U.S.C. 1371(f). The exemption was invoked here. Congress and the Executive Branch have found that, in this case, national defense interests trump the interests in avoiding small potential impacts to some marine mammals. The Ninth Circuit erred in not honoring the priority of public interests established by statute. *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S.

483, 497 (2001); *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 482-83, 487-88 (1996); Pet. Br. at 34-37.[10]

2. We agree with the Solicitor General's judgment that "absent from the Ninth Circuit's analysis is any attempt to weigh the *magnitude* of potential harm to one party against the harm to another" and to the "public interest." Pet. Br. at 47. The Ninth Circuit's opinions are inconsistent with this hallmark of equity practice.

For example, even if the Navy's training exercises pose *some* irreparable injury and hardship to Respondents' environmental interests, that should not warrant a preliminary injunction. This Court found that, in a wartime situation concerning irreparable injury from price controls, even where the plaintiff may suffer "irreparable injury," weightier "public interest" considerations allow a court to "withhold [preliminary injunction] relief." *Yakus v. United States*, 321 U.S. 414, 440 (1944) (sustaining the Emergency Price Control Act). Thus, at least three national defense-related decisions –

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[10] This is not the first time the Ninth Circuit has found that it need not respect a statutory balance on remedies. The Federal Insecticide, Fungicide, and Rodenticide Act provides detailed standards and procedures for assessing when the use of a pesticide to produce the Nation's food and fiber is outweighed by an imminent hazard to an ESA-listed species, thereby allowing a use of the pesticide to be "suspended" (preliminarily enjoined) pending a proceeding. 7 U.S.C. 136(*l*), 136d(c). Yet, the Ninth Circuit has found that courts can issue substantive injunctions that are *de facto* suspensions of approved pesticide uses for a procedural violation of the ESA where the FIFRA standards for a suspension are not met. *Washington Toxics Coal. v. EPA*, 413 F.3d 1024, 1032-35 (9th Cir. 2005).

Yakus, *Romero-Barcelo*, and *Water Keeper* – strongly suggest the Ninth Circuit erred in its balancing of pertinent public interests.

More generally, courts "should pay particular regard for the public consequences in employing the extraordinary remedy of injunction" against a federal agency. *Romero-Barcelo*, 456 U.S. at 312-13. The decisions made by Executive Branch officials charged with implementing and reconciling statutes (e.g., the Departments of Defense and Commerce in this case; and agencies such as the Environmental Protection Agency and the Departments of Agriculture and the Interior for industries in which *Amici*'s members do business) should not be preliminarily enjoined by the Judicial Branch absent some truly extraordinary, countervailing public interest.[11]

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[11] One recurring example concerns forestry. After a forest fire, the economic value of scorched trees deteriorates as logs rot and decay. The Forest Service has statutory authority from Congress to use revenues from the salvage sale of timber to fund money-losing, but environmentally desirable, reforestation. In this time-sensitive situation, the grant of a preliminary injunction can mean the salvage harvesting and reforestation will not occur, because they become uneconomic at later points in time. *See Earth Island*, 442 F.3d at 1154-55, 1177; *Forest Serv. Employees for Envtl. Ethics v. U.S. Forest Serv.*, 408 F. Supp. 2d 916, 917-18 (N.D. Cal. 2006). Yet, because the Ninth Circuit's approach often is heavily skewed towards short-term preservation, the economic and environmental harms did not dissuade Ninth Circuit panels from granting a preliminary injunctions in *Earth Island*, 442 F.3d 1147, and *Earth Island*, 351 F.3d 1291. There is some hope that the Ninth Circuit will engage in a more-neutral balancing of public interests in light of *The Lands Council v.* (continued…)

II. There Is No Likely NEPA Violation

NEPA compliance is subject to a "rule of reason." *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 767 (2004). The Navy had prepared an extensive environmental assessment on the training program. The Navy is preparing the environmental impact statement ("EIS") demanded by the lower courts. The agency charged with implementing NEPA, the Council on Environmental Quality ("CEQ"), determined that the military training missions could continue in the interim. CEQ concluded that an "emergency" exists within the meaning of CEQ's NEPA rules (40 C.F.R. 1506.11), and approved the alternative NEPA procedure of allowing military preparedness exercises to continue while an EIS is being prepared. *See* Pet. Br. at 8, 15, 22-23.

The courts below committed several errors in refusing to defer to this interpretation of NEPA rules. First, the Ninth Circuit panel analyzed the issue from the perspective of whether the district

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McNair, __ F.3d __, 2008 WL 2640001 at *20-22 (9th Cir. 2008) (en banc).

Federal agriculture programs provide another example. A district court in the Ninth Circuit recently issued a temporary restraining order followed by a permanent injunction against an Agriculture Department initiative designed to alleviate the strain caused by soaring prices for many field crops. Invoking the Ninth Circuit's preliminary injunction standard, the court held that the "possibility" of irreparable harm to plaintiffs' putative interests in wildlife was sufficient to enjoin that important program. *Nat'l Wildlife Fed'n v. Schafer*, No. CV08-1004-JCC (W.D. Wash. July 18 & 24, 2008).

court abused its discretion on its preferred reading of "emergency," rather than examining whether CEQ's construction of its own rule was "controlling" because it was not "plainly erroneous." *Auer v. Robbins*, 519 U.S. 452, 461 (1997); *see McCreary County, Kentucky v. American Civil Liberties Union of Kentucky*, 545 U.S. 844, 867 (2005) (an appellate court reviews *de novo* a district court's legal conclusions); App. 44a-50a and n.41; Pet. Br. at 22-24, 27-29.

Second, CEQ's construction is not plainly erroneous. "Emergency" has a range of meanings. One meaning is a current situation that calls for expeditious action, regardless of whether the situation was arguably foreseeable with the benefit of hindsight. CEQ's interpretation is within that range of reasonable meanings. Other courts have deferred to comparable "emergency" determinations by CEQ.[12] More generally, to ensure that needed aid and other emergency relief are not frustrated by courts, the Court should grant CEQ a wide berth in determining emergencies. *See* Pet. Br. at 24-26, 29-33.

Third, the Ninth Circuit's imposition of its (and the district court's) reading of NEPA over CEQ's reading repeats an error found in *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 354-56 (1989). There, this Court overturned the Ninth

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[12] *See Nat'l Audubon Soc'y v. Hester*, 801 F.2d 405, 408 (D.C. Cir. 1986) (foreseeable, but emergency, need to remove condors from the wild); *Valley Citizens for a Safe Env't v. Vest*, 1991 WL 330963 (D. Mass. 1991) (emergency need for military supplies); *Crosby v. Young*, 512 F. Supp. 1363, 1384-87 (E.D. Mich. 1981) (emergency need for financing of economic development).

Circuit's imposition of its preferred reading that NEPA itself requires a "worst case" analysis. This Court reversed the lower court's refusal to defer to a new CEQ rule.

Thus, CEQ permissibly found that NEPA is not violated if the military preparedness exercises continue while an EIS is prepared. Accordingly, there is no NEPA violation potentially warranting an extraordinary preliminary injunction.

III. NEPA's Purpose Does Not Mandate A Substantive Injunction For A Curable Procedural Default

The Ninth Circuit granted an intrusive preliminary injunction limiting ongoing Navy training exercises, based on the panel's finding of a likely procedural default that is being cured through the Navy's preparation of an EIS. Such a substantive injunction for a procedural violation was not warranted. *See* Pet. Br. at 37, 49.

1. *Romero-Barcelo* directs courts to look at whether the "purpose" of the statute requires an injunction. 456 U.S. at 314-16. There, this Court reversed a substantive injunction against the Navy's bombing exercises without a Clean Water Act permit. The Court found that the Navy's commitment to obtain a Clean Water Act permit was a sufficient (procedural) remedy to achieve statutory compliance. 456 U.S. at 312-18.

The fact pattern in *Romero-Barcelo* is, of course, quite similar to the naval training program and the likely procedural violation of NEPA found here. The public interest in NEPA compliance is being achieved through an extensive environmental assessment and the Navy's completion of an EIS. In

the interim, NEPA's purposes do not demand a substantive injunction against an ongoing agency action.

This is especially true because NEPA is procedural. NEPA does not elevate preservationist concerns over other public interest elements. *Robertson v. Methow Valley*, 490 U.S. at 349-53 (reversing a Ninth Circuit decision that read NEPA in a substantive, preservationist manner). *See also Amoco Prod.*, 480 U.S. at 544-46 (the "purpose of ANILCA § 810['s]. . . procedure" did not require an injunction).

2. There is a tension in lower court case law as to whether injunctions should presumptively issue for a NEPA violation. In the Ninth Circuit, some decisions find that the "importance of preserving the environment and of enforcing the law intended to preserve it," NEPA, is controlling. *Sierra Forest Legacy v. Rey*, 526 F.3d at 1234; *see, e.g.*, *Earth Island*, 442 F.3d at 1177 ("the preservation of our environment, as required by NEPA . . . , is clearly in the public interest"). The panel in the instant case seems to have followed this logic *sub silentio*.

But that logic clearly misreads this Court's decisions in *Robertson v. Methow Valley*, *Amoco Prod.*, *Romero-Barcelo*, and *eBay*. This "Court has consistently rejected invitations to replace traditional equitable considerations with a rule that an injunction automatically follows" for a violation of law. e*Bay*, 547 U.S. at 392-93.

The proper result is, as the Ninth Circuit has stated in competing line of cases, a "NEPA violation is subject to traditional standards in equity for

injunctive relief." *Northern Cheyenne Tribe v. Norton*, 503 F.3d 836, 842 (9th Cir. 2007).

3. More generally, this Court normally prefers less-drastic relief that does not prevent the agency from operating. *E.g.*, *United States v. James Daniel Good Real Property*, 510 U.S. 43, 63-64 (1993); *Brock v. Pierce County*, 476 U.S. 253, 260 (1986); *Hartford-Empire Co. v. United States*, 323 U.S. 386, 410 (1945) (a court should not enjoin the "whole conduct of the defendants' business"); *Hecht Co. v. Bowles*, 321 U.S. 321, 325-26, 329 (1944) (injunctions should not be issued to punish for past violations of law, where there is a good-faith effort to avoid violations in the future). Because the alleged NEPA deficiency is being cured in a timely fashion, the procedural "purpose" of NEPA does not warrant a substantive preliminary injunction against the continuation of military preparedness exercises.

CONCLUSION

The preliminary injunction sanctioned by the Ninth Circuit should be vacated.

Respectfully submitted,

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